

[Advisory Opinion 1998-12]

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

December 16, 1998

A County official has requested an advisory opinion “regarding various potential situations which might occur” as a result of his relationship with a law firm with which he was affiliated.

FACTS PRESENTED

The official's letter presented the following material facts:

1. He is a partner in a law firm that was established in 1985.
2. The firm represents approximately 150 condominium and homeowner associations throughout the Washington area, many of which are in Montgomery County.
3. He intends to abandon his partnership interest in the law firm effective December 31, 1998.
4. His current partner will reconstitute the partnership effective January 1, 1999, with another attorney, who is no relation to the official but, coincidentally, bears the same last name.
5. Commencing January 1, 1999, the official will become “of Counsel” to the new firm. In that capacity he will continue to service clients of the firm, providing them “legal opinions and advice regarding various issues.” He will, however, have no partnership interest in the new firm. His relationship will be that of “an independent contractor working on a part time basis,” and he will be paid by the firm on an hourly basis for work performed on behalf of the firm’s clients.
6. He will not represent any client before any Maryland or Montgomery County government agency or quasi-judicial agency, or interact with the executive branch of Montgomery County government on behalf of any client.
7. He will recuse himself “from voting on any matter in which the firm is involved.”

QUESTIONS PRESENTED

The official asked the Commission a number of questions regarding the application of the Public Ethics Law to these facts. The first six concerned potential restraints on the acts of his former partner and other members or employees of the new firm. The remaining questions concerned *his* activities on behalf of the new firm and its clients.

With regard to the official's former partner and other members and employees of the new firm, the official asked whether they may represent clients before the Montgomery County Commission on Common Ownership Communities; the Montgomery County Board of Appeals; the Maryland-National Capital Park and Planning Commission in connection with any zoning changes or any other issue, including special exceptions; the County Council in connection with land-use matters, *e.g.*, zoning changes, master plans, etc., or any other matter; and the County Council and the County Executive regarding legislation, *e.g.*, stormwater management pond inspections and repairs. He also asked if they may represent clients in attempting to obtain executive branch agency action, *e.g.*, advocating for certain code interpretations with the Department of Planning Services, lobbying for certain items such as traffic lights adjacent to condo associations, *etc.*.

With regard to the official's activities, he asked if he may, as an independent contractor to the firm, continue to represent and advise clients on matters unrelated to Montgomery County government--even though the firm also is representing the same client before other Montgomery County agencies--so long as: (1) he is not involved in any such matter; and (2) recuses himself from voting on any such matter.

APPLICABLE LAW

The questions the official raised implicated several provisions of the Montgomery County Public Ethics Law, which is codified as Chapter 19A of the Montgomery County Code, and Ethics Commission Regulation 32-97.

1. *Conflicts-of-Interest Provisions.*

The conflicts-of-interest provisions of the Public Ethics Law are set forth at §19A-11(a). In pertinent part, these provisions prohibit a public employee from participating as a public employee in, among other things:

- (1) any matter that affects, in a manner distinct from its effect on the public generally, any business in which the public employee has an economic interest;
- (2) any matter if he or she knows or reasonably should know that a party to the matter is a business in which the public employee has an economic interest as an employee; or

(3) any business or individual that is a party to an existing contract with the public employee, if the contract could reasonably result in a conflict between private interests of the public employee.

These provisions also prohibit a public employee from: (1) intentionally using the prestige of his or her office for private gain or the gain of another; (2) disclosing confidential information relating to or maintained by a County agency that is not available to the public; or (3) using confidential information for personal gain or the gain of another. §§19A-14(a) and 19A-15(a).

After receiving a written request, the Commission may waive any of these provisions if certain standards are met. §19A-8.

2. *Other Employment Provisions.*

a. The Public Ethics Law. Section 19A-12 of the Public Ethics law contains a number of general and specific restrictions on the “other employment” of public employees. Subsection (a) generally prohibits a public employee, including the official, from engaging in any “other employment” unless the employment is approved by the Commission.¹ If the Commission approves the “other employment,” it may impose conditions on its approval. *Id.*² In pertinent part, subsection (b) specifically restricts a public employee from holding any employment relationship that would impair the impartiality and independence of judgment of the public employee, unless the Commission grants a waiver under 19A-8(b). Subsection (c)(4) exempts elected public employees from these restrictions “in regard to employment held at the time of election, if the employment is disclosed to the Board of Supervisors of Elections before the election.” After receiving a written and subject to statutory standards, the Commission also may waive any of these provisions. §19A-8.

b. The Outside Employment Regulation. The “other employment” provisions of the Public Ethics Law are supplemented by an Outside Employment Regulation of the Commission.³ In pertinent part, the Regulation prohibits county employees, including the official,⁴ from being “employed by or having any economic interest in any business subject to the authority of or

¹ The Public Ethics Law defines the term *public employee* to include a member of the County Council, and *employment or employ* to mean “engaging in an activity for compensation.” §19A-4(g) and (m)(1).

² Although you have not requested approval your “other employment” by the new firm, in view of your need for a decision before January 1, 1999, the Commission is treating your letter as both a request for an opinion regarding potential conflicts-of-interest and a request for approval of your other employment.

³ The current regulation is Regulation 32-97, which was approved by County Council Resolution 13-1134.

⁴ For purposes of this Regulation, *county employee* means “[a]ny person, including elected or appointed officials (unless excepted in context) who is compensated in whole or in part by the Montgomery County Government or the Revenue Authority, Housing opportunities Commission, Board of License commissioners, independent fire department or rescue squads.”¶2.2.

doing business with the county agency or department for which they work.”¶4.4. The Regulation also authorizes the waiver of its provisions in accordance with the criteria established in §19A-8 of the Code. ¶4.13.

3. *Underlying Policy and Liberal Construction of the Public Ethics Law.*

Both the “other employment” and “conflicts-of-interest” provisions are expressly intended to be “liberally construed” to accomplish the policy goals of the Public Ethics Law. §19A-2(d). Those goals are embodied in “legislative findings and statements of policy” set forth at subsections (a), (b) and (c) of §19A-2:

(a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees are impartial and use independent judgment.

(b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

(c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.

Violations of the Public Ethics Law are subject to various civil and criminal sanctions. §§19A-27-32.

ANALYSIS & ADVISORY OPINION

The conflicts-of-interest provisions of the Montgomery County Public Ethics Law do not proscribe the independent activities of the outside employers of individuals who also are public employees.⁵ Therefore, the requester’s public office does not prevent any member or other employee of the new firm from representing clients before the Montgomery County Commission on Common Ownership Communities, the Montgomery County Board of Appeals, the Maryland-National Capital Park and Planning Commission, the County Council, or in attempting to obtain executive branch agency action of any kind.

Nor do the conflict-of-interest provisions limit the official's activities as a *private* employee. His activities as a *public* employee, however, are limited by those provisions. He may not participate as an official in any matter if he knows or reasonably should know that the firm is a party to the matter or represents a party to the matter. For these purposes, *participation* includes more than just voting. It reaches any action of any kind as a public official. For

⁵ §19A-12(d) prohibits a person from knowingly employing a public employee unless the Commission approves it or the other employment restrictions do not apply, and §19A-14(f) prohibits a person from influencing or attempting to influence a public employee to violate the Public Ethics Law.

example, it not only precludes him from participating in a hearing on the matter, but also prohibits him from discussing any aspect of the matter with his colleagues, staff or any other Montgomery County official or employee. His recusal from the matter must be complete and total.

The conflicts-of-interest provisions of the Public Ethics Law also prohibit him from “intentionally using the prestige of his office for private gain or the gain of another,”⁶ and from disclosing confidential information (relating to or maintained by a County agency) that is not available to the public or using confidential information for personal gain or the gain of another.

Although the conflicts-of-interest provisions do not limit his activities as a private employee, the “other employment” provisions of the Public Ethics Law do. In particular, these provisions prohibit him from engaging in any “other employment” unless it is approved by the Commission, and that approval may contain conditions.⁷ Furthermore, because the Public Ethics Law defines the term *employment or employ* to mean “engaging in an activity for compensation,” this “other employment” approval requirement and its conditions apply whether the “other” relationship technically is, at common law, an employer/employee relationship or an independent-contractor relationship.

The Commission also considered the Ethics Regulation’s mandate that county employees not be employed by or have an economic interest in any business doing business with the county agency or department for which they work. At first blush, this prohibition might appear to be broad enough to prohibit an official from being employed by a law firm that represents clients before the public body on which the official sits. The phrase “doing business with” is however, defined for the purposes of the Public Ethics Law. §19A-4(e) defines the term to mean:

- (1) being a party with a County agency to transaction that involves at least \$1,000 during a year;
- (2) negotiating a transaction with a County agency that involves at least \$1,000 during a year; or
- (3) submitting a bid or proposal to a County agency for a transaction that involves at least \$1,000 during a year.

Because this definition limits the phrase to transactions with county agencies, representing clients before a public body is *not* “doing business with” the public body as that

⁶ “Performing usual and customary constituent services, without additional compensation, is not prohibited by this subsection.”

⁷ Subsection (c)(4) excepts “an elected public employee in regard to employment held at the time of election, if the employment is disclosed to the Board of Supervisors of Elections before the election. Because your relationship with the new firm did not exist at the time of your recent election, the exception set forth at Subsection does not apply.

phrase is defined for the purposes of the Public Ethics Law. Therefore, the official's employment by the new firm is not proscribed by the Regulation.

In sum, in order to engage in the relationship described, the official must: (1) obtain the approval of the Commission; (2) comply with any conditions the Commission places on its approval of that “other” employment; and (3) refrain from the activities prohibited by the conflicts-of-interest provisions of the Public Ethics Law.

OTHER EMPLOYMENT APPROVAL

Based on the facts as presented in his letter, the Commission has approved the official's employment by the new firm in the capacity stated, subject to: (1) the attached General Supplemental Conditions; and (2) the following special conditions:

Special Conditions

1. He must not participate, as an employee of or independent contractor with the firm, in any *matter* (litigation, advice, research or other kind) involving:
 - (a) Montgomery County, Maryland;
 - (b) any officer, employee or unit of Montgomery County, Maryland; or
 - (c) any other public officer, employee, agent or agency funded, in whole or in part, by Montgomery County, Maryland.⁸
2. He must not advise, represent or otherwise participate in providing any legal service to or on behalf of a client on *any matter* at the same time the firm is advising, representing or otherwise providing legal services to or on behalf of that client in connection with any matter that is or will come before the public body of which he is a member or any other officer, employee, agent or unit of the legislative branch of Montgomery County, Maryland.⁹
3. Except as provided in §19A-11(b)(1) of the Public Ethics Law,¹⁰

⁸ This restriction does not apply to litigation in the Circuit Court for Montgomery County not involving (1) Montgomery County, Maryland; (2) any officer, employee, agent or unit of Montgomery County, Maryland; or (3) any other public officer, employee, agent or agency funded, in whole or in part, by Montgomery County, Maryland.

⁹ This special condition does not prohibit you from providing legal services to or on behalf of clients whom the firm is advising, representing or otherwise serving before any county official, employee or unit not in the legislative branch of the Montgomery County government, or any bi-county or state official, employee, or agency funded, in whole or in part, by Montgomery County, Maryland, so long as the services you provide are wholly unrelated to the “county” matters being handled by the firm.

¹⁰ §19A-11(b)(1) permits a disqualified public employee to act “[i]f a disqualification under subsection (a) leaves less than a quorum capable of acting, or if the disqualified public employee is required by law to act or is the

the official may not participate as a county employee in any matter that affects the firm, either directly as a business entity or indirectly in its representation of a client, unless he applies for and receives a waiver from the Commission with respect to the particular matter; and

4. He must require the firm to erect appropriate administrative “barriers” that effectively insulate him from every matter in which his participation is prohibited by one or more of these special conditions.

This approval of the “other employment” described in his inquiry does not constitute a waiver for the purposes of the conflicts-of-interest provisions of the Public Ethics Law or for any other purpose.¹¹ Thus, he must continue to comply with all other applicable provisions of the Public Ethics Law, including, by way of example but not limitation, the prohibition of the intentional use of the prestige of his office for his private gain or that of another (§19A-14) and the prohibition of the disclosure of confidential information (§19A-15). If particular circumstances arise that require a waiver and appear to meet the appropriate standard, he may request a waiver.¹²

only person authorized to act, and the disqualified public employee...discloses the nature and circumstances of the conflict.”

¹¹ As generally approved and conditioned, your relationship with the new firm does not require a waiver of §19A-12(b) unless circumstances arise that, notwithstanding the general and special conditions and restrictions, would impair your impartiality and independence with regard to a particular matter.

¹² See, e.g., §19A-8 of the Public Ethics Law and ¶4.13 of Regulation 32-97.